COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM — 35 CENTS PER NUMBER

JANUARY, NINETEEN HUNDRED AND TWELVE.

NOTES.

SUBROGATION AGAINST CESTUIS QUE TRUSTENT IN FAVOR OF CREDITORS OF AN INSOLVENT TRUSTEE.—There is a broad principle of equity jurisprudence that one who has been obliged to pay money which in equity and good conscience is primarily due from another, may call upon the latter for reimbursement.[1] In accordance with this doctrine a trustee who has incurred expense in the due administration of the trust has a lien to that extent upon the trust *res*[2] and is entitled to reimbursement thereout,[3] and if the trust estate proves insufficient he may call upon the *cestui que trust* personally.[4] But equity has gone

[1]Sheldon, Subrogation, (2nd ed.) § 11.

[2]2 Perry, Trusts, (5th ed.) § 907.

[3]Jervis *v.* Wolferstan (1874) L. R. 18 Eq. 18; Rensselaer Etc. R. R. Co. *v.* Miller (1874) 47 Vt. 146.

[4]Balsh *v.* Hyham (1728) 2 P. W. 453; *Ex parte* Chippendale (1854) 4 De G. M. & G. 19; Phené *v.* Gillan (1845) 5 Hare 1.

further than this, in many instances holding that the party bound to indemnify ought, as the ultimate debtor, to save harmless the person immediately liable. Thus where a principal debtor has given his surety security, the principal creditor is permitted, by bill in equity, to have himself substituted to the benefit thereof,[5] on the theory that the surety holds as trustee for such purpose,[6] and a similar result is reached where property is conveyed in trust to secure a surety, even though the principal creditor is no party to the conveyance.[7] This principle is also applied in holding that where stock, though sold, has not been transferred on the books of the company, so that at law the vendor is still liable in respect to calls upon the shareholders, he may require his vendee to pay the calls direct.[8]

From this it is a natural step to the theory that a creditor should be subrogated to the rights of his irresponsible debtor against a third person who in equity and good conscience is ultimately liable; and authority for this proposition is not wanting.[9] It is on this principle, doubtless, that creditors of insolvent executors and trustees with authority to carry on a business, are to a limited extent substituted to the latter's rights to reimbursement from the trust estate,[10] though on account of alleged inconveniences this right extends only to such property as is authorized to be embarked in the business.[11] Yet it is evident that ordinarily the trust estate would be put to no hardship, in the event of the trustee's insolvency, through being compelled to pay to the latter's creditors exactly what it would have owed to the trustee had he met the obligation in the first instance. Moreover since the debt must have been incurred in the due administration of the trust estate and therefore for its benefit, it would seem distinctly unjust that where the trustee is insolvent it should escape liability to the principal creditor and he thus be left remediless. Accordingly American authorities hold that in such circumstances equity will substitute the creditors to the rights of the trustee and allow them to be paid directly out of the estate.[12]

Though it is apparently settled in England that no such equity as this exists,[13] nevertheless a recent case, *In re Richardson* (1911) 80 L. J. K. B. 1232, has come very near to reaching this same result, though seemingly unwittingly. There the plaintiff was a judgment creditor on account of the trust estate of an insolvent trustee without

---

[5]Maure *v.* Harrison (1692) 1 Eq. Cas. Abr. 93; Owens *v.* Miller (1868) 29 Md. 144; Loehr *v.* Colborn (1883) 92 Ind. 24.

[6]Seibert *v.* True (1871) 8 Kan. 52; Daniel *v.* Hunt (1884) 77 Ala. 567.

[7]U. S. Bank *v.* Stewart (Ky. 1836) 4 Dana 27.

[8]Lacey *v.* Hill (1874) 43 L. J. Ch. [N. S.] 551.

[9]Green *v.* McDonald (1897) 70 Vt. 372; Lauderdale County *v.* Alford (1887) 65 Miss. 63.

[10]Laible *v.* Ferry (1880) 32 N. J. Eq. 791; *Ex parte* Garland (1804) 10 Ves. Jr. 110.

[11]*Ex parte* Garland *supra.*

[12]Sheldon, Subrogation, (2nd ed.) § 206; Thomson *v.* Smith (1887) 64 N. H. 412; Williamson's Appeal (1880) 94 Pa. St. 231; Reinstein *v.* Smith (1886) 65 Tex. 247.

[13]Strickland *v.* Symons (1884) L. R. 26 Ch. Div. 245.

assets. The assignee in bankruptcy availed himself in some manner of the trustee's right to reimbursement at the hands of the *cestui que trust,* and the question was whether the plaintiff was entitled to the fund so acquired in preference to the general creditors of the insolvent. It was decided that he was so entitled, though in reaching this conclusion the court laid down no comprehensive principle to cover such situations. Yet, leaving out of sight the question as to the right of the assignee in bankruptcy to recover the fund at all, it seems impossible to justify the result except on the theory that there existed in favor of the plaintiff some special equity against it; otherwise he could not take precedence over the general creditors. It also seems clear that this equity was not created by the action of the assignee in collecting the fund. It must have owed its existence to the fact that the plaintiff was a creditor of the insolvent trustee, and that on account of that debt the latter had the right to indemnity at the hands of the *cestui que trust.* If so, the equity must have existed from the moment the trustee became unable to meet his obligation, and we are brought face to face with the proposition that upon his insolvency the principal creditor had an equity against the *cestui que trust* which, under the English doctrine above referred to,[14] was at that time absolutely unavailing. In other words, the result that an equity existed after the liquidation by the assignee of the right of indemnity, seems inconsistent with the notion that the creditor of an insolvent trustee in respect to the trust estate may not be substituted to the trustee's right to indemnity. It would seem that the sound and just way to work out the creditor's rights would have been to declare that, since substantially the *cestui que trust* is the ultimate debtor, equity, looking through form to substance, and acting on the principles and analogies above pointed out, will cause the principal creditor to be subrogated to the rights of his immediate debtor. In this view the rights of the creditor would be unaffected by the bankruptcy, and the assignee, having collected the fund, would hold it merely as his trustee, and would of course be obliged to turn it over upon demand.

Extra-Territorial Enforcement of Tax Liability.—A question which seems to be one of first impression in this country was presented in the recent case of *Maryland* v. *Turner* (1911) 46 N. Y. Law Journal No. 47. The State of Maryland sought to collect a tax, levied upon personalty while defendant was a resident of that State, by means of a common law action in New York. Regardless of the fact that the Maryland courts consider a liability such as that of the defendant to be in the nature of a contract, it was declared to be in effect a penalty, and recovery was denied on this and on the further ground that this tax belonged to a class of foreign laws and statutes which are never accorded any extra-territorial recognition. Clearly the New York court has the right to determine for itself the question as to whether the action is to enforce a penalty,[1] and if it answers in the affirmative, to refuse relief. It is elementary that no country executes the penal laws of another,[2] and it may be conceded

[14]Strickland *v.* Symons *supra.*

[1]Huntington *v.* Attrill (1892) 146 U. S. 657, 682.

[2]The Antelope (1825) 10 Wheat. 66, 123.